FOR ARGUMENT

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No. 79-701

In the Supreme Court of the United States

OCTOBER TERM, 1979

ROADWAY EXPRESS, INC., PETITIONER

v.

J. D. MONK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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OPINIONS BELOW

The opinion of the court of appeals is reported at 599 F.2d 1378. The opinion of the district court is reported at 73 F.R.D. 411.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1979. The petition for a writ of cer-

tiorari was filed on October 31, 1979, and was granted on January 7, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a court may require counsel for plaintiffs in an unsuccessful civil rights suit to pay the fees of opposing counsel.

STATUTES INVOLVED

28 U.S.C. 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 * * *, or in any civil action or proceedings, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964 * * *, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 706(k) of Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

INTEREST OF THE UNITED STATES

The Equal Employment Opportunity Commission is the federal agency responsible for administering, interpreting, and enforcing federal employment discrimination statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Private employment discrimination suits provide the Commission with essential assistance in the enforcement process. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). Any undue increase in the risks in bringing such suits accordingly would adversely affect the Commission's responsibilities. The Commission is concerned that the imposition of extraordinary sanctions on counsel who engage in civil rights litigation would have a chilling effect on enforcement of federal civil rights statutes. Cf. *NAACP* v. *Button*, 371 U.S. 415, 435-436 (1963).

In addition, if this Court were to adopt petitioner's analysis, attorney's fees could be assessed personally against any attorney who undertook to represent a party seeking to enforce any of a wide variety of

statutes granting or protecting various federal rights that include explicit provisions for the allowance of attorney's fees.[1] The chilling effects of such a decision accordingly could extend far beyond the field of civil rights.

STATEMENT

This action was brought on behalf of three named plaintiffs and a class of black employees and applicants, alleging that Roadway Express Company and Local 194, International Brotherhood of Teamsters, had engaged in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5, and the Civil Rights Act of 1866, 42 U.S.C. 1981.

Roadway Express moved to dismiss one of the named plaintiffs for failing to appear at his deposition and to dismiss the other plaintiffs for failing to file answers to interrogatories by the time fixed by the magistrate. As part of its request for sanctions under Fed. R. Civ. P. 37(d), Roadway asked for costs and attorneys' fees (R. 343).[2]

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[1] *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 260 n.33 (1974), contains a list of approximately thirty federal statutes that contain such provisions.

[2] Fed. R. Civ. P. 37(d) provides in pertinent part:

> If a party * * * fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, * * * the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may * * * require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

After granting both motions to dismiss (R. 704), the district court assessed attorneys' costs and fees in favor of Roadway for the entire litigation. The court assessed these fees against respondents, plaintiffs' counsel, but not against plaintiffs themselves (Pet. App. 9a-10a).[3] The court imposed the sanction on counsel on the grounds that they had been dilatory[4] and had "improvidently enlarged" (Pet. App. 27a) the complaint to a class action without properly advising the named parties concerning their "responsibilities and liabilities as class representatives" (Pet. App. 22a). The court based its award on 28 U.S.C. 1927, read in conjunction with the Civil

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[3] The petition identified as respondents both the plaintiffs below (J.D. Monk, Percy Green, and Robert McPherson) and their counsel (Robert E. Piper, Jr., Frank E. Brown, Jr., and Bobby Stromile). Only the counsel respondents have filed opposing briefs. We will accordingly refer to them as respondents.

[4] The court identified, in addition to the failure to appear for the deposition and the delay in responding to interrogatories upon which petitioner's motions were based, the late filing of a brief (Pet. App. 17a-19a). The court's original ruling indicated that this brief was never filed (Pet. App. 16a, 19a). The court subsequently amended its ruling to indicate that a brief, which it found inadequate, was filed late (Pet. App. 12a).

Rights Attorney's Fees Award Act of 1976, 42 U.S.C. 1988, and Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k) (Pet. App. 22a-27a).[5]

The court of appeals vacated the district court's judgment and remanded for a reassessment of the costs. It found no clear error in the district court's conclusion that respondents had vexatiously multiplied the proceeding sufficiently to merit requiring them to pay the excess costs as provided by 28 U.S.C. 1927 (Pet. App. 4a-5a). But the court held that there was no authority to include attorneys' fees as part of those costs.

Relying on *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967), the court reasoned that "[t]o read § 1927's provision for 'costs' as including an award of attorneys' fees would require us to ascribe to Congress a purpose to vary the meaning of that term without either statutory language or legislative history to support the unusual construction" (Pet. App. 6a). The court held that Sections 2000e-5(k) and 1988 provide for the award of attorney's fees against parties only, not against counsel; these provisions may not be combined with "those of § 1927 to produce a hybrid result contemplated by none of the statutes" (Pet. App. 8a). The court accordingly

[5] Section 1927 permits a court to require an attorney who "so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously" to "satisfy personally such excess costs." Sections 1988 and 2000e-5(k) permit the court to award to the prevailing party in specified civil rights litigation "a reasonable attorney's fee as part of the costs."

remanded the case to the district court for the determination of a proper award under Section 1927, emphasizing that the award was also to be limited to the "*excess* costs caused by [respondents'] vexatious behavior * * * and not for the total costs of the litigation" (Pet. App. 8a).

INTRODUCTION AND SUMMARY OF ARGUMENT

An attorney who "multiplies the proceedings in any case [in such a way] as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs." 28 U.S.C. 1927. The precise question at issue in this case is whether the "costs" to which Section 1927 refers are only those defined in 28 U.S.C. 1920 and 1923, or whether they also include attorney's fees that may be allowed to the prevailing party "as part of the costs" in certain civil rights litigation by virtue of 42 U.S.C. 2000e-5(k) and 42 U.S.C. 1988. We submit that the conclusion that Section 1927 does not authorize the award of attorney's fees is more consistent with the statutory schemes and purposes of both the statutory fees and costs provisions and the civil rights acts, and with accepted canons of statutory construction. Since Congress has provided for the recovery of counsel fees by the prevailing party principally in cases in which it wished especially to encourage suits by "private attorneys general" to enforce federal rights, it would be peculiarly inappropriate to subject precisely those counsel who agree to prosecute such suits to the risk of special sanctions. Finally, *Alyeska*

Pipeline Co. v. *Wilderness Society*, 421 U.S. 240 (1975), indicates that the judiciary has no inherent power independent of Section 1927 (and Fed. R. Civ. P. 37) to require counsel to pay attorney's fees.

ARGUMENT

I. ATTORNEY'S FEES MAY NOT BE ASSESSED UNDER 28 U.S.C. 1927

The somewhat archaic language of Section 1927 reflects its origination in 1853, when it was part of the same statute from which Sections 1920 and 1923 are also derived (10 Stat. 161).[6] That statute, entitled "An Act to Regulate the Fees and Costs to be Allowed Clerks, Marshals, and Attorneys of the Circuit and District Courts of the United States, and for other Purposes", had as one of its primary purposes the *limitation* of the fees and costs that had previously been recoverable by the prevailing party.[7]

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[6] An earlier statute, using similar language, had been enacted in 1813. 3 Stat. 21. (For its legislative history, see 26 Annals of Cong. 43, 54, 57, 446, 456, 469 (1813-1814)). The present provision is derived directly from the 1853 Act, appearing as R.S. 982 in the 1874 codification, as Section 829 in Title 28 of the Code of the Laws of the United States in 1926, and as Section 1927 in the 1948 Code revisions. See generally *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 255-256 & nn. 26-29 (1975). No explanatory legislative history accompanies the reenactments.

[7] The House Judiciary Committee Report, H.R. Rep. No. 50, 32d Cong., 1st Sess. 6 (1852), stated that the bill was designed to "equalize [costs]—make them uniform—make the law explicit and definite, so as to prevent abuses arising from

The only costs recoverable under that Act are accordingly precisely identified in 28 U.S.C. 1920 and 1923. *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 250-257 (1975).

The Act began with the general provision that "in lieu of the compensation now allowed by law to attorneys * * * the following and no other compensation shall be taxed and allowed."[8] 10 Stat. 161. It established the maximum attorney's fees to be recovered as costs in federal litigation[9] and limited the fees and costs to be paid to court officers, witnesses, jurors, and printers. These maximums, in modified form, still limit fees and costs in federal litigation. See *Alyeska Pipelines Co.* v. *Wilderness Society*, *supra*, 421 U.S. at 255.

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ingenious construction—to cut off all constructive services—to discourage unnecessary prolixity, old useless forms, and the multiplication of proceedings, and the prosecutions of several suits which might be better joined as one." See also Cong. Globe, 32d Cong., 1st Sess. 2157 (1852) (statement by Representative Mann); *id.* at 2127 (statement by Representative Mead) *id.* at 207 (statement by Senator Bradbury). The 1853 statute, therefore, was to achieve its dual purposes by making counsel responsible for paying the costs and fees of multiple litigation while, at the same time, limiting recoveries to the maximum amounts specified in the statute.

[8] While the quoted language no longer appears in the Code, the Court noted in *Alyeska Pipeline Co., supra*, 421 U.S. at 256 n.29, that "nothing in the * * * Code indicates a congressional intent to depart from that rule."

[9] These fees are the "attorney's and proctor's docket fees" specified in 28 U.S.C. 1923. *Alyeska Pipeline Co.* v. *Wilderness Society, supra*, 421 U.S. at 257 & n.30.

Even in the absence of the strong pari materia argument available here, this Court has consistently held that, in the absence of an express reference to attorney's fees, federal legislation allowing the recovery of "costs" authorizes the assessment only of the items listed in 28 U.S.C. 1920 and 1923. See, *e.g.*, *The Baltimore*, 75 U.S. (8 Wall.) 377, 399 (1869); *Flanders* v. *Tweed*, 82 U.S. (15 Wall.) 450, 452-453 (1872); *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, *supra*, 386 U.S. 714, 720 (1967). That result is particularly appropriate here, in light of the common derivation of the three statutes. See *Erlenbaugh* v. *United States*, 409 U.S. 239, 243-244 (1972); *Clafin* v. *Commonwealth Ins. Co.*, 110 U.S. 81, 92-93 (1884). Cf. *Marks* v. *United States*, 161 U.S. 297, 302 (1896) (consistent use of a term in legislation "suggests * * * a single and settled meaning"); *Lorillard* v. *Pons*, 434 U.S. 575, 583 (1978) (words in a statute that have "a well known meaning * * * in the law of this country * * * are presumed to have been used in that sense unless the context compels to the contrary").

II. THE AVAILABILITY OF ATTORNEY'S FEES TO CERTAIN PREVAILING PARTIES IN CIVIL RIGHTS SUITS DOES NOT PERMIT THE ASSESSMENT OF THOSE FEES AGAINST COUNSEL PERSONALLY

Petitioner concedes that Section 1927 does not itself authorize the assessment of attorney's fees against opposing counsel. Petitioner claims instead that "Section 1927 simply provides for a shifting of

responsibility for the payment of costs authorized by other statutes applicable to the case or other authority available to the court" (Br. 17). But the "other statutes" on which petitioner relies (42 U.S.C. 2000e-5(k) and 42 U.S.C. 1988) cannot reasonably be interpreted to permit such a shifting, and there is no indication in their legislative history that Congress intended to modify the settled interpretation of Section 1927.[10] Instead, these statutes are designed to serve quite a different purpose; interpreting them in the way petitioner suggests would subvert that purpose.

As this Court explained in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 420-421 (1978), Congress permitted prevailing defendants in civil rights suits to recover attorney's fees in order to discourage plaintiffs from bringing suits that are "frivolous, unreasonable, or without foundation." [11] In contrast,

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[10] The implied modification of the settled construction of an earlier statute by a subsequent one is not favored. *United States* v. *Madigan*, 300 U.S. 500, 506 (1937). If Congress wishes to modify Section 1927, it is perfectly capable of doing so expressly. See note 18, *infra*; cf. Fed. R. Civ. P. 37.

[11] We note that the district court here did not find that plaintiffs' suit itself met that test. Indeed, that court stated that counsel's actions prejudiced plaintiffs "by jeopardizing their claims," and that those claims were sufficiently substantial to require defendants' counsel to prepare "for what appeared to be a most serious law suit" (Pet. App. 27a). Moreover, since EEOC had determined that there was reasonable cause to believe petitioner had violated Title VII in its hiring practices (C.A. App. 397), the suit could scarcely be considered without merit under the *Christiansburg* standard. The district court did state that counsel improperly

Section 1927 permits the award of costs against counsel who "multiplies proceedings in any case [so] as to increase costs unreasonably and vexatiously." The award of costs under the civil rights Acts turns on the merit of the suit itself, while an award under Section 1927 turns on the manner in which the suit is litigated. This difference apparently reflects congressional appreciation of the division of responsibility between client and counsel in litigation—the client being primarily responsible for the decision to sue, while counsel bears the primary responsibility for the manner in which the suit is conducted.[12] The two statutes accordingly are addressed to two entirely different situations: on the one hand, misconduct by a *party* in bringing suit, and on the other, misconduct by *counsel* in the conduct of the suit. It

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"broaden[ed] the case into a class action", thus "improvidently enlarg[ing]" it (Pet. App. 27a). However, even if the excess costs attributable to such "enlargement" might properly be assessed against plaintiffs or their counsel under 42 U.S.C. 2000e-5(k) or 42 U.S.C. 1988, it is far from clear that those costs were significant. The scope of discovery in employment discrimination suits is generally the same whether or not the action is brought as a class action. See *Burns* v. *Thiokol Chemical Corp.*, 483 F.2d 300 (5th Cir. 1973); cf. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

[12] This perception of counsel's responsibility for the manner in which the suit is litigated is also reflected in the provision in Fed. R. Civ. P. Rule 37, which permits the assessment against counsel of the costs of failures to proceed properly in discovery. Some of the improprieties of counsel the district court identified here would arguably justify an award of the excess costs of discovery under Rule 37 (see, *supra*, pages 4-5). And, of course, the contempt sanction is available for misconduct warranting its imposition.

is irrelevant to Section 1927 whether the suit itself has merit, as it is irrelevant to the fee provision of the civil rights Acts whether the suit is expeditiously litigated. Petitioner's interpretation overlooks this fundamental difference in the two statutory purposes.[13]

Even more significantly, that interpretation would undercut the congressional purpose in enacting the civil rights attorney's fees provisions. Congress was well aware of lawyers' reluctance to accept civil rights cases.[14] The fee provisions were designed to reduce that reluctance and thus to "make it easier for a plaintiff of limited means to bring a meritorious suit" (110 Cong. Rec. 12724 (1964) (Statement of Senator Humphrey explaining provision that became 42 U.S.C. 2000e-5(k)). But petitioner's interpretation of these statutes would have precisely the opposite effect, because it would increase the financial hazard facing counsel for plaintiffs in such suits.[15]

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[13] Petitioner suggests (Br. 9-11, 16 n.14) that its interpretation has the advantage of requiring the individuals responsible for its costs to compensate it for them. But Fed. Rule Civ. P. 37 permits petitioner to recover from respondents the excess costs resulting from their failures in discovery. In the absence of any finding that the suit itself was frivolous and without foundation petitioner is not, under *Christiansburg*, entitled to more.

[14] See S. Rep. No. 1011, 94th Cong., 2d Sess. 1-7 (1976); 122 Cong. Rec. 31851 (1976) (Statement by Senator Kennedy); *id.* at 32185 (Statement by Senator Tunney); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 1-11 (1976).

[15] Petitioner's interpretation would not facilitate the recovery of attorney's fees by counsel for prevailing plaintiffs, since such costs are already awarded "unless special circum-

Although ideally there should be no increase in the hazard for lawyers who handle the litigation competently, in fact there is a substantial risk that permitting judicial discretion to assess attorney's fees against plaintiff's counsel in civil rights cases would be perceived as creating a risk for any such counsel appearing before a hostile judge. Cf. *NAACP* v. *Button*, 371 U.S. 415, 433-444 (1963); *In re Primus*, 436 U.S. 412, 431-439 (1978). Moreover, the threat of sanctions against a lawyer who must practice before a hostile judge is likely to be a substantially greater deterrent to civil rights enforcement than the threat of sanctions against a litigant who may appear before that judge once in a lifetime.

Petitioner's interpretation would increase the possible sanctions against counsel only in those situations in which Congress has specifically authorized the award of counsel fees to the prevailing party.[16] But as this Court has recognized "under some, if not most, of [these] statutes, * * * Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation" (*Alyeska Pipeline Co.* v. *Wilderness Society, supra*, 421 U.S. at 263). It

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stances would render such an award unjust." *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 (1975); *Northcross* v. *Memphis Board of Education*, 412 U.S. 427, 428 (1973).

[16] The Court in *Alyeska Pipeline So.* v. *Wilderness Society, supra*, 421 U.S. at 260-261, n.33, identified approximately 30 federal statutes that contain such provisions.

would surely be anomalous if the very use of the "private-attorney-general concept" (*ibid.*) were to subject counsel for those enforcing the public policy to special hazards.

III. A FEDERAL COURT HAS NO INHERENT AUTHORITY TO REQUIRE COUNSEL FOR A LITIGANT TO PAY THE OPPOSING PARTY'S COUNSEL FEES

Petitioner's final argument is that the district court had inherent power to require respondents' counsel to pay petitioner's attorney's fees, either under "the 'bad faith' exception to the American rule" prohibiting assessment of costs against a losing party (Br. 19), or under the court's power to impose sanctions on attorneys as officers of the court (Br. 20). Neither argument has merit.

This Court summarized the "bad faith" exception as permitting a court to "assess attorneys' fees for the 'willful disobedience of a court order * * * as part of the fine to be levied on the defendant'; or when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Co.* v. *Wilderness Society, supra*, 421 U.S. at 258-259 (citations omitted). See also *Hutto* v. *Finney*, 437 U.S. 678, 689 n.14 (1978); *Christiansburg Garment Co.* v. *EEOC, supra*, 434 U.S. at 419. While the exception thus obviously applies to the bad faith of the *parties to the litigation*, not their counsel, petitioner suggests that it should be extended to permit the assessment of fees also against counsel who act in bad faith in conducting litigation. But

whatever the inherent power of a court might be in the absence of legislation,[17] Congress has provided specifically for the sanctions available in such circumstances by enacting 28 U.S.C. 1927 and Fed. R. Civ. P. 37. It is for Congress, not the courts, to decide whether, and to what extent, additional sanctions are necessary.[18] As the Court has noted, Congress has given no "roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." *Alyeska Pipeline Co.* v. *Wilderness Society, supra,* 421 U.S. at 260.

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[17] Petitioner's reliance (Br. 7, 19) on *Sprague* v. *Ticonic Nat'l Bank,* 307 U.S. 161 (1939), for the proposition that courts possess the inherent power to assess costs of litigation other than conventional taxable costs is inconsistent with this Court's analysis of that case in *Alyeska Pipeline Co.* v. *Wilderness Society, supra,* 421 U.S. at 258, as the dissenting opinion of Mr. Justice Marshall makes clear (*id.* at 279).

[18] The Senate has passed a bill that would amend Section 1927 to include attorney's fees within the costs that may be assessed against attorneys for their unreasonable conduct of litigation (S. 390, 96th Cong., 1st Sess. (1979), 129 Cong. Rec. 10117 (1979)). The bill was referred to the House Committee on the Judiciary on July 24, 1979 (125 Cong. Rec. H6549 (daily ed. July 24, 1979)). This bill would apply equally to all counsel in any federal litigation, rather than singling out those litigating civil rights cases or others in which plaintiffs are acting as private attorneys general.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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